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No. 08-218

Supreme Court, U.S.
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In the Supreme Court of the United States

MASSEY ENERGY COMPANY AND CENTRAL WEST VIRGINIA ENERGY COMPANY,

Petitioners,

v.

WHEELING PITTSBURGH STEEL CORPORATION AND MOUNTAIN STATE CARBON, LLC,

Respondents.

On Petition for a Writ of Certiorari to The Supreme Court of Appeals of West Virginia

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents offer no persuasive reason why this Court should not decide whether it violates due process to require petitioners to pay nearly a quarter of a billion dollars in compensatory and punitive damages when (1) petitioners received no appellate review of the award and (2) a judge with an actual bias against petitioners participated in the decision to deny appellate review.[1]

I. REVIEW IS WARRANTED ON THE RIGHT-TO-APPEAL QUESTION.

A. Contrary to respondents' contention (Opp. 12-14), petitioners have not forfeited their claim that they have a due-process right to an appeal.

Petitioners had no obligation to raise the claim in their petition for appeal, because the constitutional violation did not occur until the Supreme Court of Appeals denied the petition. In that respect, this case is like *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District*, 281 U.S. 74 (1930), in which this Court addressed a claim that had not been raised before the issuance of the state-court decision under review. The claim there was a constitutional challenge to a provision that no law could be declared unconstitutional without the concurrence of at least six of the seven members of the state supreme court. The decision under review affirmed a lower-court decision that a law was constitutional, even though five members of the state supreme court believed that the law was *un*constitutional. This Court decided the

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[1] Petitioners' previous Rule 29.6 Statement remains accurate, except that, as of September 30, 2008, no publicly held company owns 10% or more of Massey's stock.

claim on the merits because "the point could not have been taken earlier, as in advance of the affirmance on a vote of the minority the question would have been speculative." *Id.* at 79. So too here, in advance of the denial of the appeal—which, we might add, was quite unexpected, given the magnitude of the judgment and the substantiality of the appellate issues—the question whether there is a due-process right to an appeal would have been speculative.

When, as here, the constitutional violation does not arise until the appellate court's decision is issued, the petitioner is sometimes able to raise the claim in a petition for rehearing. That was true, for example, in *Bryant*. See 281 U.S. at 77. But West Virginia's rules do not authorize a petition for rehearing when the decision at issue is the denial of a petition for appeal. See W. Va. R. App. P. 24(a) (petition for rehearing may be filed after "the entry of judgment" and must state "the points of law or fact which * * * the Court has overlooked or misapprehended"). The rules do authorize a petitioner to "renew the petition [for appeal] as many times as he desires during the period prescribed by law for presentation of petitions." W. Va. R. App. P. 7(a). But that period had expired by the time the petition here was denied. This is therefore a case in which the state court "[will not] entertain a petition for rehearing and the federal question can be raised in no other way than through the papers addressed to [this] Court." EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE § 3.18, at 196 (9th ed. 2007); see *Saunders* v. *Shaw*, 244 U.S. 317, 320 (1917).[2]

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[2] *Herndon* v. *Georgia*, 295 U.S. 441 (1935), on which respondents rely (Opp. 12-13), is distinguishable. The asserted consti-

Even if petitioners were required to raise the claim in the court below, however, that requirement was satisfied. In its petition for appeal, Massey argued that, "to guarantee the due process rights of the appellant," the court was required to make "a de novo determination" of whether a punitive award was justified and, if the court found that it was, "a de novo review" of the size of the award. Massey Amended Pet. for Appeal 21. Because an appellate court cannot provide *de novo* review if it does not provide *any* review, the language quoted above adequately raised the claim that petitioners have a due-process right to appellate review of the punitive-damages award. "Though inexplicit, * * * the due process [right-to-appeal] issue [was] within the clear intendment of [petitioners'] contention and * * * such issue [is therefore] sufficiently presented." *Braniff Airways, Inc.* v. *Nebraska Bd. of Equalization*, 347 U.S. 590, 599 (1954).

B. Respondents are also mistaken in contending (Opp. 14-16) that there is no constitutional right to an appeal of substantial damages awards.

The brief in opposition offers no response at all to most of the arguments in the petition and the supporting amicus briefs. For example, respondents do not dispute that there is a right to appeal under each of the due-process methodologies employed by this Court—contemporary practice (see Pet. 17-18), historical practice (see Pet. 18-20; Law Professors Amicus Br. 2-9), and the balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976) (see Pet. 20 n.5). Nor do respondents take issue with the proposition

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tutional violation there occurred in the trial court, not the state supreme court, and the petitioner failed to challenge the violation on appeal to the state supreme court.

that due process requires consistent and reasonably predictable outcomes, which are impossible without rigorous appellate review of jury awards. See Nat'l Mining Ass'n Amicus Br. 3-15. Finally, respondents do not deny that the question whether there is a right to appellate review is nowhere more important than in West Virginia, which has the most toxic litigation climate of any of the fifty States. See Pet. 24-26; Am. Chemistry Council Amicus Br. 13-18.

Instead, respondents contend that this Court "has consistently proclaimed * * * that the Due Process Clause does not require a state to provide appellate review of its trial court's rulings." Opp. 14. Like statements to the same effect in some of the Court's criminal cases, however, the statements in the civil cases cited by respondents (*ibid.*) are dicta. In each of those cases, the State *did* provide the right to an appeal; the issue was whether the State discriminated in doing so.

In addition to demonstrating that there is a right to appellate review of substantial damages awards under this Court's due-process methodologies, the petition shows (at 13-17) that a right to appeal is recognized in the Court's punitive-damages decisions. In arguing otherwise, respondents challenge the notion that, because this Court has recognized a due-process entitlement to *de novo* appellate review of punitive awards, there is a due-process requirement that there *be* appellate review of such awards. See Pet. 15-17. Respondents rely on the fact that this Court has "held that appellate courts must apply a *de novo* standard of review to several types of rulings in criminal cases" even as it has "reaffirmed that the Due Process Clause does not require states to provide any appellate review in criminal cases."

Opp. 16. But the decisions cited by respondents that require *de novo* review are federal cases (*ibid.*), in which a criminal defendant has a statutory right to an appeal. The decisions therefore do not contemplate, much less establish, a right to *de novo* appellate review without any right to appeal. In any event, as the petition explains (at 21-22), statements in this Court's decisions that there is no due-process right to an appeal in a criminal case are dicta that likely would not be followed if the question were given plenary consideration.

C. Respondents are also mistaken in contending (Opp. 17-18, 20-22) that West Virginia affords constitutionally adequate appellate review of substantial damages awards.

Respondents' premise is that the Supreme Court of Appeals reviews punitive awards at the petition stage. It is hardly clear, however, that such a procedure was contemplated by *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1992), the case on which respondents rely (Opp. 17-18, 20). The relevant language in Syllabus Point 5 of that decision[3]—"[u]pon petition, this Court will review all punitive damages awards"—could be, and has been, interpreted to mean that the Supreme Court of Appeals will grant plenary review in all punitive-damages cases in which a petition is filed. See, *e.g.*, George N. Stewart & Dora A. DeCourcy, *West Virginia*, in PUNITIVE DAMAGES IN COMMERCIAL TRANSPORTATION: A STATE BY STATE SUMMARY 52 (Edgar M. Elliott, IV & Andrew T. Stephenson eds. 2007). If that is what the

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[3] In West Virginia, "new points of law" are "articulated through syllabus points." *Walker* v. *Doe*, 558 S.E.2d 290, 296 (W. Va. 2001).

Supreme Court of Appeals meant in *Garnes*, it obviously no longer follows that practice.

Even if the court did mean that review of punitive awards would occur at the petition stage, however, such review falls far short of the "[e]xacting appellate review" required by the Constitution. *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 418 (2003). Petition-stage review differs from plenary review in at least two critical respects. First, the Supreme Court of Appeals ordinarily denies a petition for appeal without full briefing, without the full trial record, and without oral argument. Compare W. Va. R. App. P. 3-5 with W. Va. R. App. P. 8-12. Second, if the court denies a petition for appeal, it almost never prepares an opinion providing its reasons. Such a decision—typically, as in this case, a one-line order—"is not an adjudication on the merits and does not carry any implication of approval of the judgment sought to be reviewed," *Triggs* v. *Berkeley County Bd. of Educ.*, 425 S.E.2d 111, 117 n.9 (W. Va. 1992), unless—unlike in this case—the order denying review indicates that the petition has been "rejected because the lower court's judgment or order is plainly right," *State ex rel. Miller* v. *Stone*, 607 S.E.2d 485, 488 n.3 (W. Va. 2004) (per curium) (internal quotation marks omitted). Reviewing a punitive award only at the petition stage, therefore, would not only deprive the petitioner of the careful scrutiny required by the Constitution, it would prevent the court from "clarify[ing]" the applicable legal principles, *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (internal quotation marks omitted), and thereby undermine the fundamental due-process requirement that "a person receive fair notice * * * of the conduct that will subject him to punishment * * * [and] the severity of the

penalty that a State may impose," *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996).

D. This Court has previously denied certiorari in two cases from West Virginia presenting the question of whether there is a due-process right to appellate review of punitive awards. See *Mountain Enters., Inc.* v. *Fitch*, 541 U.S. 989 (2004); *Camden-Clark Hosp. Corp.* v. *Boggs*, 128 S. Ct. 2080 (2008). But the denial of certiorari in those cases, is not, as respondents contend (Opp. 18-20), a reason to deny certiorari in this case.

First, unlike the petition here (at 18-20), the petitions there did not describe the historical evidence supporting a right to appellate review. That evidence is critical to a proper resolution of the question, particularly in light of this Court's heavy reliance on historical evidence in holding that there is a due-process right to judicial review of punitive awards in *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994).

Second, unlike the damages awarded here, which total nearly a quarter of a billion dollars, the total damages awarded there were relatively modest—less than $20 million in *Mountain Enterprises* (see 03-1223 Pet. 8) and less than $5 million in *Camden-Clark* (see 07-812 Pet. 6). In light of the size of those awards, the absence of appellate review in West Virginia may have been perceived to be an insufficiently serious problem to justify this Court's intervention.

Subsequent events demonstrate that that is no longer true. On May 22 of this year, the West Virginia Supreme Court of Appeals not only denied review of a judgment of more than $200 million in this case, but also denied review of a judgment of ap-

proximately $400 million in the *Tawney* case. See *Estate of Tawney* v. *Columbia Natural Resources*, LLC, No. 32966 (W. Va. May 22, 2008). Those verdicts were two of the seven largest in the Nation in 2007. See Pet. 24-25. If it was not previously clear that the question presented here is ripe for resolution, therefore, it is surely clear now. There is a pressing need to decide whether a State may require a citizen to pay a jury's award of hundreds of millions of dollars in compensatory and punitive damages when the award has been reviewed by a single, locally elected trial-court judge—and by no one else.

II. REVIEW IS WARRANTED ON THE RECUSAL QUESTION.

A. Contrary to respondents' contention (Opp. 22-25), petitioners' recusal claim is properly before this Court. A federal question may be considered by the Court if the question was either "presented" to the state court *or* "addressed" by it. *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997) (per curiam). The question whether Justice Starcher's recusal is required by the Due Process Clause of the Fourteenth Amendment was both presented *and* addressed below.

In their initial motion to recuse, petitioners argued that "[t]he underlying rationale for disqualification is based on principles of due process." Joint Mot. to Recuse 3. In a supplement to their renewed motion to recuse, petitioners likewise argued that a refusal by Justice Starcher to recuse himself "would constitute a violation of * * * the constitutional right of Massey and Central West Virginia to have their case heard by an impartial and unbiased tribunal." 2d Joint Submission in Supplementation of Renewed Joint Mot. to Recuse 4.

Respondents claim that that was insufficient, because it is not clear that the argument was based on the United States rather than the West Virginia Constitution. Opp. 23-25. In fact, it is perfectly clear that the argument was based on the United States Constitution. Immediately after the first statement quoted above, the recusal motion quoted at length a decision of the West Virginia Supreme Court of Appeals that in turn quoted this Court's decision in *In re Murchison*, 349 U.S. 133 (1955), one of the principal cases on which we rely in the petition (see Pet. 26-27). Part of the language in *Murchison* quoted in the motion was that "[a] fair trial in a fair tribunal is a basic requirement of due process"; that "[f]airness of course requires an absence of actual bias in the trial of cases"; and that "no man is permitted to try cases where he has an interest in the outcome." Joint Mot. to Recuse 3 (quoting *State ex rel. Brown* v. *Dietrick*, 444 S.E.2d 47, 51 (W. Va. 1994), in turn quoting *Murchison*, 349 U.S. at 136). The due process at issue in *Murchison* was obviously *federal* due process.

In any event, Justice Starcher addressed the federal constitutional issue in denying the motion to recuse. In the penultimate paragraph of his opinion, he "challenge[d] all parties to read United States Supreme Court cases such as *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) and *In re Murchison*, 349 U.S. 133 (1955)." Pet. App. 18a. *Aetna*, like *Murchison*, addresses when a judge's recusal is required under the Fourteenth Amendment. See Pet. 27. Justice Starcher's opinion went on to say that, "[i]f my decision to participate in the instant case can be argued to create due process problems of constitutional dimension, so be it." Pet. App. 18a. Justice Starcher thus considered whether he was obligated

to recuse himself as a matter of federal constitutional law and decided that he would not recuse. That is sufficient to place the recusal question before this Court.

B. Respondents are also mistaken in contending (Opp. 25-26) that there is no conflict in authority on the question. In fact, the recusal issue implicates two separate conflicts. First, as the petition explains (at 26-29), Justice Starcher's refusal to recuse himself despite his deep-seated animosity towards Massey is patently inconsistent with this Court's due-process decisions on judicial bias. See Sup. Ct. R. 10(c) (certiorari may be granted when the decision below "conflicts with relevant decisions of this Court"). Second, as the petition also explains (at 30-32), this case provides the Court with an opportunity to resolve the question that was left open in *Aetna* and has divided federal courts of appeals and state courts of last resort: whether a biased appellate judge must cast the deciding vote in order for the party objecting to the judge's participation to obtain relief.

C. Respondents are mistaken, finally, in contending (Opp. 26-34) that Justice Starcher's recusal was not constitutionally required. This is not a case, as respondents suggest, in which a judge has merely exercised his right to comment on issues affecting the administration of justice (Opp. 29-30) by "publicly disapprov[ing] of a party's conduct" (Opp. 27). The persistence and truculence of Justice Starcher's attacks (see Pet. 5-7, 28) take them far from the realm of permissible public comment and demonstrate beyond any conceivable doubt that he was ac-

tually biased against Massey.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[4] *United States* v. *Conforte*, 624 F.2d 869 (9th Cir. 1980), on which respondents rely (Opp. 27-28), provides no support for their position. *Conforte* rejected the claim that a trial judge was required to recuse himself in a criminal case because, at a cocktail party years earlier, he had advised that a college football team reject contributions from the defendant, who ran a brothel and was a twice-convicted felon. The court found it "reasonable to expect a judge to advise against involving educational institutions with brothel owners or felons" and did "not think that because of this advice the judge was unable to give the defendant a fair trial." 624 F.2d at 881. The isolated, private, long-past, and measured statement in *Conforte* bears no resemblance to the repeated, public, still-current, and vitriolic attacks here.